Europeanisation of legal principles? The influence of the CJEU's case law on the principle of legitimate expectations in the Netherlands and the United Kingdom

Europeanization of Legal Principles? The Influence of the CJEU'S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom

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Europeanization, from a legal point of view, denotes the process by which national rules and structures are influenced by EU law and case law. Administrative law is a crucial field of law affected by the EU. The general principles of administrative law, developed in all Member States to safeguard the adherence to the rule of law by the government, are no exception to this. By examining the principle of legitimate expectations in two Member States, namely the Netherlands and the United Kingdom, this article reviews to what extent national legal principles have been influenced by the case law of the CJEU and whether the Court's interpretation is reflected in the corresponding national legal principles. This assessment is compared to the principle of legitimate expectations as developed by the CJEU, after which the influence of the Court on the possible (dis)similarities is discussed. In the second part, this paper reflects on the theory of legal autonomy and its portrayal of the Court as an integration actor, and its relation to the influence of the CJEU on the interpretation of legal principles.

1 INTRODUCTION

It is by now common knowledge that European Union (EU) law has a profound influence on national law, to which administrative law is certainly no exception. Among the aspects of administrative law affected by EU law, are the national principles that ensure that the rule of law is upheld in any circumstance by government agencies. However, the Court of Justice of the European Union (CJEU), entrusted to oversee the uniform application of EU law, has also developed a whole array of general principles (including proportionality, fundamental rights, equality before the law, subsidiarity), that are used to determine the lawfulness of legislative and administrative measures in EU-related

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Boymans, Philippe & Eliantonio, Mariolina. 'Europeanization of Legal Principles? The Influence of the CJEU'S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom.' *European Public Law* 19, no. 4 (2013): 715–738.

cases.[1] While some of these principles are generally sufficiently straightforward, others are more contested, with substantial discussion regarding their content, if not their existence. The national administrative systems have to adhere to these principles when acting within the scope of application of EU law.[2] By doing so, national legal systems are increasingly being influenced by the CJEU, in other words, Europeanized. Furthermore, national legal systems may decide to change their own principles to a certain extent to comply with the EU principles, not only in EU-related cases where they are under an obligation to do so, but even in purely internal situations.[3]

Europeanization works both ways. Just as much as the EU influences the Member States (in other words, downloading), the Member States in turn influence the EU (in other words, uploading).[4] If we apply this concept to legal principles, the aspect of downloading can be found in the obligation of Member States to adhere to EU law. This obligation follows from the principle of supremacy of EU law, another rather controversial principle in many Member States.[5] The aspect of uploading can be found in the fact that, among the variety of sources the judges of the CJEU draw upon to formulate these principles, the common factor is still the national laws of the Member States: general principles of law common to all legal systems.[6] Therefore, one could hypothesize that interpretation of national law in conformity with EU legal principles, should not be an issue, as every Member State should already have incorporated the principle in one form or the other, as the CJEU primarily draws its inspiration from national law. From this starting point, therefore, the working hypothesis underlying this paper is that, in the national legal systems, there are no difficulties in the interpretation by national judges of the various legal principles, as to the conformity with EU law.

In order to find out whether the interpretation of legal principles is indeed in conformity with the CJEU's case law, this paper will use the principle of legitimate expectations to analyse whether the above stated hypothesis is true or false. The main question is thus whether the interpretation of the principle of legitimate expectations in the Member States is in conformity with the CJEU's case law.

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1 For further discussion on these principles, see J. Schwarze, *European Administrative Law* (2d ed., Sweet & Maxwell 2006) and D. Chalmers, *European Union Public Law* (Cambridge U. Press 2010).

2 Chalmers, *supra* n. 1, at chapters 4, 5, 6, 7, 9 and 10.

3 For a more elaborate discussion on this topic, see J. Jans et al., *Europeanisation of Public Law* at ch. 1 (European Law Publishing 2007).

4 N. De Vos, *Europeanisering van het vertrouwensbeginsel* at 17–22 (Boom Juridische Uitgevers 2011). For example, Joined Cases T-125/03 R and T-253/03 *R Akzo Nobel* [2007] ECR II-3523. See the Order of the President of the CFI of 30 Oct. 2003 [2003] ECR II-4771.

5 Chalmers, *supra* n. 1, at ch. 4, 169–172 and ch. 5.

6 T. Tridimas, *The General Principles of EU law* at 1–58 (2d ed., Oxford U. Press 2006).

First, in order to answer the research question, this paper will discuss how the principle of legitimate expectations is interpreted in two legal systems, which are both EU Member States, namely the Netherlands and the United Kingdom.[7] The choice of these Member States for analysis is not random. Both follow a completely different theory of legal thinking, respectively civil law and common law. The underlying assumption is that this contrast has caused legitimate expectations to develop in a different form, which has made it all the more difficult for the CJEU to develop a principle suitable for every legal system. Furthermore, preliminary research shows that the Netherlands generally offers a higher level of protection to an individual's expectations, than English administrative law. Therefore, it will be interesting to investigate the differences in interpretation, as well as the differences in influence of the CJEU.

In order to carry out the case study, the constitutional law, general administrative legislation and national case law of the two legal systems will be reviewed and compared. Subsequently, the situation in these two states will be compared to how the principle is recognized under European law as established by CJEU case law, in order to detect any dissimilarities.

Second, it will be reviewed whether and to what extent the EU principle of legitimate expectations has influenced the interpretation of the national principles. This question is crucial to determine the influence of the CJEU on the interpretation of legal principles in the Member States. In order to answer this question, national case law will be reviewed to identify changes in interpretation by judges, in both EU-related cases falling under national jurisdiction, and purely internal situations.

In the second part, this paper will discuss the theory of legal autonomy and its relation to the influence of the CJEU on the interpretation of legal principles, the latter of which is discussed in the first part of this paper. This theory has been used to explain the development of the principles of direct effect and supremacy of EU law. The theory basically purports that the CJEU is an integration actor, whose only goal is to further the integration of the EU, even at the expense of the interests of individual Member States. Although only afforded a marginal space in this paper, the discussion will attempt to provide a detailed reasoning as to whether the theory of legal autonomy can also account for the rationale of the CJEU in shaping and influencing national legal principles, in particular the principle of legitimate expectations.

At the end, a conclusion will be drawn to sum up the results of the analysis, and to provide an answer to the research question.

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[7] Please note that, for the purposes of the assessment carried out in this article, the case law discussed is that of England and Wales.

2 PART I: CASE STUDY

2.1 Principle of Legitimate Expectations

The principle of legitimate expectations can be explained as a principle of good faith relating to expectations, stating that when a government agency has acted in such a way as to evoke a justified expectation on the part of the citizens, the government agency must make good on its promise. In the following section, the Dutch principle and then English concept of the principle will be examined. Subsequently, the same analysis will be carried out in respect of the principle as developed by the CJEU.

2.1[a] *The Netherlands*

The general principle of legitimate expectations is not codified in the General Administrative Law Act (GALA),[8] which is not all that surprising given its rather complicated content. As stated above, legitimate expectations of a citizen, raised by acts or omissions of the administration, must not be frustrated if possible. This obligation is, however, not absolute. There are several conditions and criteria, which are explained further below.[9]

2.1[a][i] Are the Expectations Legitimate?

An administrative authority is in principle only bound by expectations that are raised by itself, or by a person or body competent and authorized to speak or act on its behalf.[10] However, most problems arise when expectations are raised by administrators or public servants, who are not authorized to speak and act on behalf of their administrative authority, while the appearance has been raised that they are. The courts have made clear that they are very reluctant to grant binding

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[8] However, with regard to the revoking and alteration of subsidies, the principle is codified in section 4.6.2 GALA. This will be further discussed below. Additionally, with regard to general policy rules, it can be argued that the principle is codified in Article 4:84 GALA, which states that administrative authorities should comply with their policy rules, unless due to exceptional circumstances the caused detriment to an individual would be disproportionate to the purpose of the policy, i.e. that the individual relies on a certain representation, which in light of circumstances is deemed reasonable enough to justify actions contrary to the policy.

[9] On the Dutch principle of legitimate expectations, see De Vos, *supra* n. 4, at ch. 6, and R.J.N. Schlössels, *Beginselen van behoorlijk bestuur*, in *Nederlands Tijdschrift voor Bestuursrecht 6* at 174–176 (Kluwer Law International 2011).

[10] L.J.A. Damen, *Bestuursrecht 1* at 399 (3d ed., Boom Juridische Uitgevers 2009), Article 10:2 GALA.

effect to these 'unauthorized' raised expectations on the grounds of apparent authority.[11]

2.1[a][ii] Can the Actions Raise Expectations?

The gravity of the interest in honouring the raised expectations depends on the nature of the decision or action which raised the expectation. Whereas specific decisions or representations directed against a specific citizen, are often regarded as legitimate expectations, other more general statements aimed at a larger number of people, are most often regarded as being less sufficient. Furthermore, if a citizen knew that the administrative authority was wrong, or if he himself – perhaps by providing incorrect or incomplete information – was intentionally misleading, or if he could have foreseen the repeal of a decision, or a new rule, he cannot justifiably rely on the legitimate expectations.[12] Little attention is paid to the competences and abilities of the individual.[13] Therefore, more protection is given to the individual, and a higher duty of care is placed on the administrative authority.

2.1[a][iii] Are the Expectations Legitimate?

Generally speaking, the larger the detriment to the citizen by violating the expectations, the more reason there is that the expectation should be honoured, and the greater the public interest should be to justify any violation of these interests. An increasingly important criterion is the so-called *dispositievereiste*. This criterion basically requires a citizen to have acted upon the raised expectations in such a way that he would normally not have done, and that undoing the act would result in considerable detriment. The disposition requirement is not at all a necessity, though it is certainly an influential factor.[14]

However, even when all of the criteria above are fulfilled, the administrative authority is still not obliged to honour the legitimate expectations.[15] In order to deviate from the expectations, the administrative authority requires a lawful justification, often derived from the public interest.[16] Furthermore, if next to the

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11 Damen, *supra* n. 10, at 400–404, ABRvS 2-9-1999, Gemeentestem (2000) 7122.7 m.nt. Teunissen (*Eindhovense supermarket*), ABRvS 13-10-2004, JB 2005, 74 m.nt. Verheij (*braakliggende akkerranden*).

12 Damen, *supra* n. 10, at 404–406.

13 De Vos, *supra* n. 4, at 327–328. This will be further discussed in chapter B.

14 Damen, *supra* n. 10, at 407–408

15 Damen, *supra* n. 10, at 409–411.

16 Such justifications include: a correct application of policy would have lead to a different decision, the administration relies on force majeure in the sense that honoring the expectation would cause serious and unforeseen damage to the public interest, etc.

interests of the citizen, interests of a third party will be affected by the decision of the administrative authority, it must always weigh both interests.[17]

2.1[a][iv] Contra Legem Application of Legitimate Expectations?

The courts have accepted that, when applying the law strictly is unfair to such an extent that, considering the intention and scope of the applicable provision, the consequences could not have been desired by the lawmaker, the administrative authorities are allowed to refrain from applying the law, in order to give effect to a legitimate expectation.[18]

Several criteria for *contra legem* applications of a legal principle can be deduced from the case law.[19] First the application may not be detrimental to a third party interest, which means that only in a strictly financial relationship (such as a subsidy), where there is a two-party relationship (administration-citizen), does the *contra legem* application have any chance of success. Second, the detriment to the individual's interest must be sufficiently determinable. Furthermore, all of the criteria discussed in previous sections must be fulfilled, whereby the disposition requirement is of particular importance.[20]

2.1[a][v] Codified Principle of Legitimate Expectations in Subsidy Cases

The withdrawal of subsidies in the Netherlands is regulated in section 4.2.6 GALA.[21] However, Article 4:49 GALA, which in principle codifies the principle of legitimate expectations in these cases, only allows the withdrawal of a subsidy in three situations: (1) on the basis of new facts or circumstances of which the national authority could not reasonably have been aware at the time; (2) if the granting of the subsidy was incorrect and the applicant should have been aware of this; and (3) if the applicant has not fulfilled the conditions of the subsidy itself.

This codification generally complies with the unwritten principle. However, a clear difference lies in the absence of a reference to the requirement of good faith of the applicant. The second option only refers to mistakes by the administrative

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17 Damen, *supra* n. 10, at 411.
18 Damen, *supra* n. 10, at 418–422.
19 Damen, *supra* n. 10, at 424–425.
20 However, whereas the Supreme Court (HR), as highest tax law court, has accepted contra legem application of general principles of law (see HR 12-4-1978, AB 1979, 262 m.nt. Van der Burg (*doorbraakarresten*)), the Department of Administrative Law of the Council of State (ABRvS) has recently adopted the viewpoint that no general principle of good governance can be applied contrary to a statutory provision (see ABRvS 18-01-2006, AB 2006, 187 m.nt. Verheij (*onjuiste informatie Laser*). See Damen, *supra* n. 10, at 420–422.
21 De Vos, *supra* n. 4, at 285–289.

authority, not to mistakes made by the applicant. As discussed below, this limitation presents several problems.

2.1[b] *United Kingdom*

In *Schmidt v. Secretary of State for Home Affairs*, Lord Denning stated that the duty for administrative authorities to allow an individual to address the public body, before a decision would be taken that would damage his interests, depended on whether the person had some right or interest or some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.[22]

It is only after extensive case law that this protection of procedural legitimate expectations was expanded in order to match the concept of substantive legitimate expectations, as developed by the CJEU.[23] Within this new doctrine, there are two kinds of representations. First, an authority may have made a representation that was within its power, but then seeks to depart from it. Second, the representation itself may have been outside the power of the administrative authority or public servant who made it.[24] In the next sections, these representations will be described respectively as the *intra vires* and *ultra vires* representations.[25]

2.1[b][i] *Intra Vires* Representations

The leading case on substantive legitimate expectations is *R v. North and East Devon Health Authority,* ex parte *Coughlan*.[26] Ms Coughlan, seriously injured in a traffic accident, was moved to Mardon House to receive better care in 1993. She relied on the express assurance that she could stay there for as long she wanted. Several years later, the Health Authority that had made the assurances, decided to close the facility and move the residents. The applicant challenged this decision, claiming that she had a legitimate expectation to have a home for life.[27]

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22 *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149, 171, CA.

23 For further discussion on this development, see S. Schønberg, *Legitimate Expectations in Administrative Law* at 7–63 (Oxford U. Press 2000).

24 These representations often lead to conflicts with the legality principle. In the first case, because of the fact that, if an individual can hold an administrative authority to its promises, this would fetter on the discretion that every authority has in forming public policy. This in itself would be outside the law. In the second case, the principle of legality simply states that because the representation was 'outside the law', the administrative authority should not be bound by it.

25 P. Craig, *Grounds for Judicial Review: Substantive Control Over Decisions*, in *English Public Law* 731 (David Feldman ed., 2d ed., Oxford U. Press 2009).

26 *R v. North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, CA.

27 In the end, the Court of Appeals decided that the consequences of breaking the promise to Ms Coughlan, were disproportional to the economic interests put forward by the administrative authority.

The Court of Appeal distinguished between three situations of legitimate expectations. Cases involving a change of policy affecting large numbers of individuals, such as prisoners,[28] will be reviewed under the so-called *Wednesbury* test (if the administrative authority could reasonably have come to the decision to change its course).[29] Cases where there was a legitimate expectation of being consulted before a decision, must be fully reviewed by the court as to whether what happened was fair. These cases basically concern procedural legitimate expectations. The third case is about substantive legitimate expectations. In this type of case the court will decide whether the frustration of the expectation was so unfair, that to take a new and different course of action would amount to an abuse of power. In other words, whether the change of policy or representation is proportionate in relation to the interests involved.[30] When the legitimacy of the expectation is established, the court has the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.[31] Most cases within this category are likely to be those where the expectation is confined to one person or a few people.[32]

To decide whether an expectation is legitimate and reasonable, the courts consider several factors.[33] The most important factor is the representation itself. A clear and unambiguous representation provides the strongest foundation for a claim.[34] Additionally, individual statements, reports and agreements provide strong foundations as they are more specific.[35] General statements to larger groups of people have little chance of being honoured.[36] However, an expectation will not readily be regarded as legitimate if, for example, the individual knew beforehand that the representation was not intended to create an expectation, that policy was about to change, or if the individual has not disclosed all relevant issues, that is to say, has not been honest.[37] The test is what an ordinary or reasonable person would expect in all circumstances.[38]

Furthermore, a very important criterion is that of detrimental reliance. This requirement is logical, since if the individual has suffered no detriment, there is no

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28 See, e.g., *R. v. Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906, CA.

29 For further discussion on this topic, see Schønberg, *supra* n. 23, at 7–63, and C. Hilson, *Europeanization of English Administrative Law: Judicial Review and Convergence*, in *European Public Law 9* at 131–136 (Kluwer Law International 2003).

30 Craig, *supra* n. 25, at 734–735. *R (on the application of Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ. 1363.

31 *R v. North and East Devon Health Authority, ex p Coughlan* [2001], para. 57.

32 *R v. Inland Revenue Commissioners, ex p Preston* [1985] AC 835, HL.

33 Craig, *supra* n. 25, at 735–737.

34 *R v. Independent Television Commission, ex p Flextech plc* [1999] EMLR 880.

35 *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 174.

36 *R. v. Secretary of State for the Home Department, ex p Hargreaves* [1997].

37 *R v. Gaming Board of Great Britain, ex p Kingsley (No 2)* [1996] COD 241.

38 *R. v. Secretary of State for the Home Department, ex p Hargreaves* [1997].

reason to hold the agency to its representation.[39] However, this condition is not absolute. If the individual has relied on the expectations but there is no measurable detriment, it can still be unfair to thwart an expectation.[40]

In contrast, even if the expectation is legitimate, the administrative authority may have very good reasons to refrain from honouring it. It may be in the public interest to change its policy, and since the inherent discretion in policy making of every administrative authority may not be excessively fettered, it has the competence (or even obligation) to weigh all interests involved.[41] This weighing may result in an unfavourable decision for the citizen.[42]

2.1[b][ii] *Ultra Vires* Representations

A representation is ultra vires if it is outside the power of the public body, or the public servant who made it.[43] These types of cases include situations in which the administrative authority has promised a decision that goes against the law (*contra legem*).[44] Traditionally, these representations are regarded as incapable of binding public bodies.[45] This rule is the so-called jurisdictional principle.[46] The reason behind the principle is twofold.[47] First, an administrative authority would be able to extend its powers at will, merely by making an ultra vires representation and subsequently being bound by it through the legitimate expectation. Second, to allow an ultra vires representation to bind a public body would be to prejudice third parties that might be affected, who would have no opportunity of putting forward their views.[48]

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39 *R v. Secretary of State for the Environment, ex p NALGO* [1992] COD 282.

40 *R (on the application of Bibi) v. Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237 at para. 54-55.

41 Schønberg,*supra* n. 23, at 119–125.

42 Craig, *supra* n. 25, at 742–743.

43 D. Blundell, *Ultra Vires Legitimate Expectations*, in *Judicial Review 10* at 147 (HeinOnline 2005).

44 These situations of contra legem application go much further than traditional ultra vires representations. When the municipal council cannot be bound by one of its own officers when it is merely about a competence normally reserved for the council, it is only logical that promising an unlawful decision is entirely out of the question. Contra legem applications are therefore not possible.

45 However, recently there are signs that this approach might be changing. For further discussion on this, see cases *Stretch v. United Kingdom* [2004] 38 EHRR 12, and *Rowland v. The Environment Agency* [2003] EWCA Civ 1885 [2004] 3 WLR 249.

46 Craig, *supra* n. 25, at 746–748.

47 Craig, *supra* n. 25, at 746.

48 The principle is most clearly put forward in *Western Fish*, in which the plaintiff received a letter from a planning officer that in essence exempted him from having to apply for a planning permission for certain reparations. Even though the reparations had already begun, the Court of Appeal ruled that no representation by the planning officer – irrelevant of his apparent authority – could allow him to do what was assigned to the council in the Town and Country Planning Act 1971, without specific delegation of competences to the planning officer. See *Western Fish Products v. Penwith District Council* [1981] 2 All ER 204. For further discussion on Ultra Vires representations, see Blundell, *supra* n. 43, at 174–155, and Craig, *supra* n. 25, at 745–750.

2.1[c] *European Court of Justice*

The principle of legitimate expectations was first applied in EU law in 1973 in *Commission v. Council,*[49] and was recognized as a fundamental principle of the EU legal order in *Töpfer* in 1978.[50]

Acts that give rise to expectations are legislative or administrative decisions, policy rules and guidelines, and certain assurances (the latter of which must be sufficiently specific and precise).[51] Only the administrative authorities that are competent under legislation to take a certain decision are capable of giving rise to a legitimate expectation regarding that decision.[52] This limitation means that a national authority cannot create a legitimate expectation regarding the exercise of competences of EU institutions.[53] As such, it is quite similar to the English doctrine of ultra vires representations.[54]

Various factors are relevant when deciding whether an expectation is legitimate.[55] The expectation is not legitimate, if a prudent and attentive citizen could have foreseen that a new measure or decision was going to be taken in the near future, and that this decision would likely affect his interests.[56] Similarly, if an administrative authority gives inaccurate information, an individual is not allowed to rely on the information if he should have reasonably discovered the inaccuracy. In these cases the CJEU requires a considerable degree of diligence from individuals. The standard test is whether the prudent and diligent trader, who is quickly assumed to be able to recognize mistakes of administration, would have been able to discover any faults.[57] Furthermore, the individual must have acted in good faith when supplying information, or generally when dealing with the administrative authority.[58] Finally, another relevant factor is the extent to which a person has been adversely affected as a result of acting in reliance of the

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[49] Case 81/72, *Commission v. Council* [1973] ECR 575.

[50] Case 112/77 *Töpfer* [1978] ECR 1019. Schwarze, *supra* n. 1, at 870–874.

[51] Jans et al., *supra* n. 3, at 166. If an administrative authority has failed over a prolonged period of time to act in a way detrimental to an individual, this may give rise to the legitimate expectation that the power will no longer be exercised. However, this will only be allowed in exceptional circumstances.

[52] Jans et al., *supra* n. 3, at 167.

[53] This is often shown in cases of recovering unlawful state aid. It is the Commission that has the exclusive power to decide on the compatibility of state aid under Article 107 TFEU, and so, only the Commission can create a legitimate expectation in this respect. Whether the national authority gave rise to the 'hope' of the individual that the aid was allowed, is irrelevant.

[54] Case 228/84, *Pauvert v. Court of Auditors* [1985] ECR 1969.

[55] Jans et al., *supra* n. 3, at 167–169.

[56] Joined Cases C-37/02 and C-38/02, *Di Leonardo Adriano* [2004] ECR I-6911.

[57] M. Sunkin, *Grounds for Judicial Review: Illegality in the Strict Sense*, in *English Public Law* at 631–633 (David Feldman ed., 2d ed., Oxford U. Press 2009). See, e.g., Case 161/88, *Binder* [1989] ECR 2415.

[58] In cases of applications for subsidies this is only logical. In *Huber* the court stated: 'The application of the principle of legitimate expectations assumes that the good faith of the beneficiary of the aid is established.' See Case C-336/00, *Huber* [2002] ECR I-7699.

expectation, that is, he has performed acts based on the expectation, which he would otherwise not have done, and which cannot be reversed or only at a high cost.[59]

It is settled case law that *contra legem* application of legitimate expectations is not allowed.[60] Thus, assurances given by EU institutions or national authorities, or practices by Member States, are incapable of generating legitimate expectations if they concern acts that are contrary to EU law.[61] This limitation is only logical, because otherwise Member States would be allowed to deliberately pursue policies contrary to EU law, which would in turn threaten the uniform application of EU law.

2.2 Comparative Analysis between the CJEU and the National Principle of Legitimate Expectations

2.2[a] *The Netherlands*

It is important to note that, generally speaking, the Dutch principle of legitimate expectations is similar to the EU version. However, there are differences in the application of the principle in certain situations.[62]

2.2[a][i] Similarities

From the case law, it can be derived that both the CJEU and the national judge take the same approach in analysing who and what gave rise to the legitimate expectation. Furthermore, a legitimate expectation cannot only arise from a representation, but also from rules, laws and other decisions. The same applies to expectations raised by specific promises. Additionally, an important similarity lies in the approach to the weighing of interests. That an expectation is legitimate does not mean that it must be honoured. A weighing of the interests of the individual, with the public interest and the interests of third parties, must always take place. An important factor is the disposition requirement. In both national and EU cases, an

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59 See, e.g., Case C-508/03, *Commission v. United Kingdom* [2006] ECR I-3969.

60 Jans et al., *supra* n. 3, at 169.

61 In *Maizena* the CJEU clearly stated: 'A practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law and this is so even where the Commission has failed to take the necessary action to ensure that the State in question correctly applies the Community rules.' In the case, Germany had consistently applied a certain method to calculate a refund. This method was, however, contrary to EU law, even though the Commission had failed to challenge the national provisions. See Case 5/82, *Maizena* [1982] ECR I-4601, and Case 316/86, *Krücken* [1986] ECR I-2213.

62 For a general comparative study on Dutch and EU legitimate expectations, see De Vos, *supra* n. 4, at chapters 4, 5 and 6.

expectation is more likely to be honoured if the individual has acted on the expectation in such a way, that he would normally not have done, and which cannot be undone or only at great expense.

2.2[a][ii] Differences

While there are several minor differences, three major dissimilarities are of particular importance. First, the CJEU considers the objective expertise of the individual a very important factor. In both legal systems, a legitimate expectation raised by unlawful conduct of the administrative authority does not have to be honoured if the citizen should have reasonably ascertained the unlawfulness. However, whereas the Dutch judge pays little attention to the competences and abilities of the citizen, the CJEU considers whether the prudent and diligent trader, who is quickly assumed to be able to recognize mistakes of the administration, would have been able to discover any faults.

Second, it is settled CJEU case law that *contra legem* application of the principle of legitimate expectations is not allowed. In Dutch law, it can be allowed under exceptional circumstances, but the CJEU judge has consistently stated that ultra vires representations by national or EU institutions, or practices of Member States contrary to EU decisions, cannot give rise to a legitimate expectation to an act contrary to EU law.

Third, even though both legal systems require good faith of the individual, it is the Dutch codified principle that poses problems. As stated above, Article 4:49 GALA does not refer to the good faith of the applicant, suggesting that this is not required, as the article exhaustively regulates the situations that can lead to a withdrawal of a subsidy. Therefore, in line with the general policy of the Dutch legislator to afford a high level of protection to individuals, a higher duty of care is placed on the administrative authority, than is the case in EU law.

2.2[b] *United Kingdom*

It is worth mentioning that until relatively recently the UK did not know the concept of substantive legitimate expectations. Protection was limited to procedural rights. Therefore the focus lies on how to comply with the EU principle. However, in essence both versions are relatively the same.[63]

[63] For a general comparative study on English and EU legitimate expectations, see Schønberg, *supra* n. 23, at ch. 4, and Jans et al., *supra* n. 3, at 163–186.

2.2[b][i] Similarities

First, the test to determine whether an expectation is reasonable, is in English law what a reasonable, ordinary person would expect in all circumstances. The CJEU refers to a prudent and diligent trader who is quickly assumed to be able to recognize mistakes of administration. In practice, this difference does not lead to hugely deviating outcomes, as both courts take a strict view on what an individual can reasonably expect. Similarly, administrative authorities must, under both English and EU law, consider reasonable expectations, and weigh them against the reasons of public policy in favour of a decision which will disappoint such expectations. In doing so, both legal systems consider whether the individual will suffer any disproportionate detriment should his expectations be frustrated. The English detrimental reliance is therefore similar to the disposition requirement adopted by the CJEU. Finally, both English courts and the CJEU take similar approaches to unlawful representations, in the sense that they are generally incapable of binding administrative authorities. The reasoning for doing so is the same: to prevent public bodies from extending their powers beyond their statutory competences at will. This reasoning also applies to *contra legem* situations – these are not allowed.

2.2[b][ii] Differences

There is a clear difference in the approaches of the CJEU and the English courts to the departure from general representations on the grounds of a shift in policy. Obviously, general representations are unlikely to give rise to legitimate expectations, as they do not specifically address an individual. But also because administrative authorities inherently have discretion to change their policy from time to time. However, the English courts are very reluctant to interfere where legitimate expectations are disappointed as a result of general changes of policy. The standard of review in these cases is merely whether the administrative authority has acted reasonably.[64] The proportionality test is not applied. The CJEU on the other hand, will restrict the application of a policy change if there is a significant imbalance between the interests of those affected and the policy considerations in favour of the change. As shown by *Mulder,*[65] the CJEU will intervene much earlier than English courts, which will only do so should there be

[64] The so-called *Wednesbury* test. See Part I, Chapter A, section II.

[65] Joined Cases C-104/89 and C-37/90, *Mulder and others v. Council and Commission* [2000] ECR I-203. Schwarze, *supra* n. 1, at cxlvi.

a manifestly unreasonable change.[66] The variation shows that the main difference between the CJEU and English courts' approaches is the measure of review to be used.

2.2[c] *Preliminary Conclusion*

On certain key points, the Dutch principle offers more protection than the EU version. The difference can be explained by the fact that the 'discovery' and development of the Union principle of legitimate expectations is probably inspired by German law, in which the principle is known as *Vertrauenschutz,* and is regarded as a fundamental right that can be derived from the German Basic Law.[67] However, in other Member States – such as the United Kingdom – the principle was (and is) less familiar, and more recently introduced. Probably as a consequence of these national differences, the protection provided by the CJEU on the basis of the principle is less extensive than in German and Dutch administrative laws. Therefore, the debates in the Netherlands concern the limiting effect of Union law on their national principle of legitimate expectations, while in the United Kingdom the discussions centre around how to comply with the more extensive protection offered by the EU principle.

This analysis shows that the hypothesis presented in the introduction – i.e. that, since the CJEU allegedly takes inspiration to develop legal principles from the Member States' traditions, the EU legal principles should naturally comply with the interpretation of national legal principles – is actually incorrect.

2.3 Influence of the CJEU

2.3[a] *Introduction*

EU law has a profound influence on national administrative law. For example, the principle of proportionality was codified in the Dutch GALA under influence of the CJEU case law.[68] As such, the national and EU legal systems interact substantially. In the following part, it will be analysed to what extent EU law has influenced the national principles of legitimate expectations in the Netherlands and the United Kingdom. It will be reviewed whether this influence was felt in a

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66 There is a nuance to this. Recent case law shows that there is a shift towards a general proportionality test in substantive legitimate expectations, doing away with the *Wednesbury* test, thus limiting the differences with EU law. For further discussion on this topic, see Hilson, *supra* n. 29, at 138–143.

67 Schwarze, *supra* n. 1, at 886-900.

68 In the Explanatory Memorandum there is an express reference to the CJEU case law to show that it is a generally accepted principle of law. See Parliamentary Papers II, 1988-1989, no. 21221, no. 3, 70–71.

purely internal situation, or in an EU-related matter. Little attention will be paid to cases of direct application of EU law, as Member States have no choice but to apply EU law instead of national law, following from their obligations under the Treaties and the doctrine of supremacy of EU law.[69] At the end, a preliminary conclusion will be drawn to sum up the results of the analysis and to provide an answer to the research question.

2.3[b] *The Netherlands*

2.3[b][i] EU-related cases

In the Netherlands, the issue of legitimate expectations is most commonly raised in cases regarding subsidies granted by the EU.[70] If a subsidy is granted contrary to the relevant EU subsidy regulations – that is, that not all conditions have been satisfied – Member States are under the obligation to withdraw the subsidy.[71] In cases of indirect application, when it is not expressly regulated in EU law how the Member States should implement a particular European subsidy regulation, national authorities use national law. Thus, the national principle of legitimate expectations is used when it comes to deciding whether to withdraw a subsidy, or to protect the individual's expectations.[72]

In contrast, there is a growing trend of further Europeanization in these national cases, which is shown by the *ESF* case.[73] In this case, numerous subsidies offered by the European Social Fund (ESF), were granted by the minister of Social Affairs to support several projects. However, the Commission found out that the paperwork for the projects did not meet the requirements established in subsidy Regulation No 2052/88.[74] Moreover, the Dutch government had used the subsidies to partially fund the body responsible for executing the social policy. On this basis, the Commission decided that the Netherlands had to repay the subsidies, which therefore had to be retroactively withdrawn from the projects, which were

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69 For further discussion on this topic, see De Vos, *supra* n. 4, at 311–318.

70 In other EU-related cases than subsidies and state aid, there are few appeals to the national principle of legitimate expectations. However, in CBB 27-06-2008, AB 2008, 282, m.nt. Ortlep, the CBB ruled in effect that the national principle should be applied contrary to the EU principle, even though it was about the execution of EU policy by a national private legal person. Due to it being the only case, its influence is doubtful. Therefore, whether this silent defiance of several core EU principles will be followed by the CJEU and other national courts, remains to be seen. For further discussion, see the note of Ortlep.

71 Article 4 para. 3 TEU.

72 De Vos, *supra* n. 4, at 318–325.

73 Joined Cases C-383/06 and C-385/06, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* e.a., [2008], ECR I-1561. See the underlying cases, for example, ABRvS 02-08-2006, JB 2006, 274.

74 Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 185, 9–20.

already completed. The obligation to repay the subsidies was laid down in Article 23(1) of Regulation No 4253/88.[75] This article required the Member States to recover any amounts lost as a result of an irregularity or negligence, without there being any need for the authority to do so under national law. As there were no established rules as to how to implement this obligation, the Member States had to use national law.[76]

However, on the basis of Article 4:49 GALA, which was the designated provision to be used, the subsidies could not be withdrawn. The minister could have been aware of the fact that the applicants did not meet the requirements of the subsidy, if he had thoroughly checked them. The second option only refers to mistakes by the minister, not to mistakes made by the applicant which lead to the wrongful grant of the subsidy.[77] The third option does not apply either, since the applicants did fulfil the obligations under which they were allowed to keep the subsidy.

Under normal circumstances the subsidy could thus not be withdrawn in order to protect the legitimate expectations of the recipients of the subsidies. However, the CJEU decided that the national principle of legitimate expectations should be applied only within the boundaries of the EU principle, whereby it referred only to cases of direct application of EU law, thus implying the use of the EU principle itself. Furthermore, in the dictum, the court explicitly stated that the EU principle should be applied. The Dutch judge adopted this view without argument, and ruled the appeals to a legitimate expectation to be unsuccessful, without actually considering on which option of Article 4:49(1) GALA the decision was based.[78] The subsidies thus had to be withdrawn.[79]

The ruling, in effect, has the consequence that section 4.2.6 GALA has to be stretched to comply with the obligations of Article 23(1) of the Regulation. The CJEU effectively expanded the scope of the EU principle to apply to certain subsidy cases, normally falling under national law, therefore making sure that the higher level of protection offered to individuals by Article 4:49 GALA, gives way to the uniform application of EU law (albeit only in EU-related cases).

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75 Regulation No 4253/88 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Regulation No 2082/93. For Regulation No 4253/88, see OJ L 193, 20. For Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, see OJ L 374, 1.

76 This was confirmed later in C-158/06, *ROM-projecten*, [2007] ECR I-5103.

77 Parliamentary Papers II 1993/94, no. 23780, no. 3, pp. 77-78.

78 The only reason of any use, that was given, was that the grant of the subsidy was a violation of the subsidy regulation. This seems to hint towards option (b) of Article 4:49 GALA.

79 For further discussion on this case, see De Vos, *supra* n. 4, at 197–201, 315–318.

2.3[b][ii] Purely Internal Situations

The influence of the CJEU in purely internal situations is less prominent for obvious reasons. Why should a Member States adapt the values it holds highly, to another standard, if it does not have to? As stated above, there are three distinctive differences between the Dutch and EU principle of legitimate expectations.

Regarding the first difference, there are several cases in which the courts did find the capabilities of the individual decisive. In a case regarding a dispute about the denial of an import of oranges from Brazil, the Trade and Industries Appeals Tribunal (CBB) rejected an appeal to the principle of legitimate expectations, stating that the individual was a professional market participant.[80] Although these cases prove that the criterion is certainly not absent, it would be an exaggeration to say it plays a role to speak of, given the numerous cases in which it was given no thought whatsoever. One might speculate that in the cases where the professionalism of the individual was a factor, the judge took inspiration from the EU principle. However, no concrete evidence of this theory exists as of today.

Concerning the second difference, one might wonder whether the national courts increasingly reject an appeal to a *contra legem* application of the principle of a legitimate expectation, under the influence of CJEU case law. As stated above, the Department of Administrative Law of the Council of State (ABRvS) has adopted the viewpoint that no general principle of good governance can be applied contrary to a statutory provision.[81] The ABRvS decided that under no circumstance can the appeal to a legitimate expectation lead to the grant of a subsidy under the Subsidy Regulation Agricultural Nature Conservation, contrary to Articles 77a and 20b of the regulation. However, it cannot be proven with sufficient certainty that this policy is due to influence of the CJEU case law, or due to the inherent controversy of the practice itself.

Similarly, the influence of the CJEU on the third difference is evenly debatable. In a case regarding a foundation that had used educational subsidies to fund teaching lessons and courses, but which had incorrectly applied for the subsidy to the respective minister, the ABRvS decided that the minister could withdraw the subsidy on the basis that the foundation knew, or should have known, that the subsidy grant was incorrect.[82] The withdrawal could be based on Article 4:49(1)(b) GALA. This reasoning is remarkable, since the ABRvS, in the cases underlying the *ESF* case, was still of the opinion that, in accordance with the Explanatory Memorandum on the article, this option could not serve as a basis for

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[80] CBB 17-04-2003, *LJN* AF7702. See also ABRvS 4-06-2008, *AB* 2008, 208, and ABRvS 2-09-2009, *LJN* BJ6647.

[81] ABRvS 18-01-2006, AB 2006, 187 m.nt. Verheij (*onjuiste informatie Laser*). See Damen, *supra* n. 10, at pp. 420-422.

[82] ABRvS 26-08-2009, Case 200808878/1/H2, LJN BJ6097.

a withdrawal of a subsidy.[83] This ruling is especially remarkable, when it is considered how very similar the facts of both cases actually are. A motivation for the decision was not given in the case. However, it is clear that the scope of Article 4:49 GALA has been expanded. Whether this expansion is due to the influence of the CJEU is rather premature to determine, however likely it may be.

2.3[c] *United Kingdom*

As previously discussed, the protection of (procedural) legitimate expectations first appeared in English law in *Schmidt*. There are strong opinions that the very introduction of the principle can be traced back to influence of other Member States or the EU. The former president of the CJEU, Lord Mackenzie, expressed such opinions:

> can one here detect the influence of Community law or at least that of some of the Member States? It is at least possible to suggest the answer is yes. The concept of recognizing that a failure to respect legitimate expectations may give rise, in public law, to a remedy is a novelty in English law and lacks discernible English parentage. To find the true ancestry one does not have to look far beyond the Channel.[84]

Currently, the most important difference between legitimate expectations in EU law and in English law is the judicial review applied to actions of administrative authorities. English law has been found lacking in the protection it offers, due to the relatively high threshold that needs to be reached before the courts will intervene on the basis of unreasonableness.[85] It is only in recent years – most notably since *Coughlan* – that the UK has started to recognize a principle of substantive legitimate expectations.[86] The notion of the principle was first introduced in English law in *Hamble Fisheries*.[87] In *Hamble Fisheries*, the transfer of fishing licenses from one vessel to another was allowed under the old policy, but was abolished under the new policy introduced in response to the EU Fisheries Policy. Hamble Fisheries, which had purchased two fishing vessels specifically for this goal, pleaded substantive legitimate expectations. The Court of Appeal decided that since the government had used its power to change policy as a result of implementing European policy, it had to take into account the full extent of CJEU case law, including the case law on legitimate expectations. Whether the principle

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[83] See for example, CBB 23-04-2007, AB 2007, 247, m.nt. Duikersloot and Ortlep; CBB 14-11-2007, LJN BB8852; CBB 25-02-2009, LJN BH4694 en CBB 1-09-2009, LJN BJ7538.

[84] A.J. Mackenzie Stuart, *Recent Developments in English Administrative Law – The impact of Europe?* in *Liber amicorum P. Pescatore* at 417 (Nomos Verlagsgesellschaf 1987).

[85] Hilson, *supra* n. 29, at 6–7.

[86] *R v. North and East Devon Health Authority, ex p Coughlan* [2001].

[87] *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995].

has indeed been infringed, depends on whether the expectation has a legitimacy which in fairness out tops the policy choice which threatens to frustrate it. The court therefore employed a principle of substantive legitimate expectations, governed by a proportionality based review.[88]

In *First City Trading*, the court was of the view that *Hamble* was a case where the European model of legitimate expectations was mandated by EU law, since the UK government was implementing the EU Fisheries Policy.[89] From the strict dualist perspective of the court, substantive legitimate expectations and proportionality would only be allowed in EU cases. There would be two systems: procedural legitimate expectations and a *Wednesbury* review test for domestic cases, and substantive legitimate expectations and proportionality in EU cases. The *Wednesbury* test would allow the courts to protect the expectations of an individual only if the decision of the administrative authority to violate the expectation was unreasonable in such a way that no administrative authority could come to that decision. But it would be limited to give procedural rights. The proportionality test allowed a review as to whether the violation of the expectations of the individual was proportional to the public interest served by the decision, and allowed substantial protection of an expectation.[90]

Later, the *Hamble* approach was also dismissed as 'heresy' in *Hargreaves* for domestic cases.[91] However, in *Coughlan* a spillover from *Hamble* took place, which allowed for substantive review and a proportionality test in certain domestic cases (regarding specific representations to specific individuals), while leaving the *Wednesbury* test for other cases (regarding general policy changes affecting larger numbers of individuals). The court refers to *Hamble* several times, thus implying that the case was influential in introducing the concept to English law, even though the court did not go as far as applying the principle directly to the domestic case. It did, however, decide to use substantive legitimate expectations as a review for government measures, thus employing a proportionality-type review much the same as the CJEU. In other words, *Coughlan* lead to the convergence of two separate systems to a certain extent. Post-*Coughlan*, for most cases there are not two separate systems of law operating in relation to legitimate expectations – one domestic and one European; there is, instead, just one unified system.[92]

However, the only substantial difference that remains is that the courts still do not apply the proportionality test to cases of general policy changes that affect

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88 See also Jans et al., *supra* n. 3, at 184–185.
89 *R. v. Ministry of Agriculture, Fisheries and Food, ex parte First City Trading Ltd* [1997] 1 CMLR 250.
90 Hilson, *supra* n. 29, at 18–19.
91 *R. v. Secretary of State for the Home Department, ex p Hargreaves* [1997].
92 Hilson, *supra* n. 29, at 13–19.

larger numbers of individuals. In that sense, one could say that the two system approach proposed in *First City Trading*, is still in effect to a certain extent.

2.3[d] *Preliminary Conclusion*

What can be concluded from this analysis is that the CJEU has a profound influence on the national legal systems. In Dutch administrative law, the CJEU had a particular influence in EU-related subsidy cases. It has been shown that in cases where the uniform application of EU law is threatened by the higher level of protection offered by the national principle, the CJEU is not afraid to expand the scope of application of the EU principle of legitimate expectations, at the expense of the latter, in favour of the former. In effect, the CJEU limited the jurisdiction of the national principle, thus expanding the influence of the EU principle.

However, whether the EU principle of legitimate expectations has actually shaped the national equivalent to a certain extent is doubtful. Although recently, there have been changes made to the national principle that comply with the EU principle, there are no ascertainable facts that prove that the changes are due to the influence of the CJEU. An explanation for the difference might be that the Dutch legislature and courts deemed it necessary to offer much more protection to individual expectations, and that pressure to comply with the European principle is less prominent than when the Dutch principle would provide less protection, simply because it is more desirable to have more as opposed to less protection. However, this question is somewhat outside the scope of this paper and should be examined in further research.

In English law, the influence of the CJEU has been substantial. *Hamble Fisheries* effectively adopted the principle of substantive legitimate expectations into English law, without a compelling ruling of the CJEU to do so, as was the case in the Dutch *ESF* case. However, there are many that argue that *Hamble Fisheries* is still an EU-related case, which forced the court to adopt the European approach to an EU case. *Coughlan*, however, was a purely internal situation where the court voluntarily adopted substantive legitimate expectations to apply to a national case, unprecedented in English law at the time. In most cases the ruling has lead to a convergence of review approaches, to one unified system to review cases of legitimate expectations.

If one compares the influence of the CJEU on both legal systems, it can be seen that in the Dutch legal system there is a high influence in EU-related cases. In contrast, there is only mild influence in purely internal situations. However, in English law, there has been much more influence in purely domestic cases. It is therefore safe to say that the rulings of the CJEU have had a more fundamental impact on English administrative law than on Dutch administrative law.

3 PART II: THE AUTONOMOUS NATURE OF THE CJEU

3.1 Introduction

There are many different views regarding the (rather controversial) role the court plays in the integration process. The most common one to explain the rationale of the CJEU is the legal autonomy approach. Legal and neo-functionalist scholars assert that over the years the CJEU has acquired through its case law a certain autonomy, which enables it to further its goal of European integration, without taking much heed from the interests of the Member States.

This theory has been used to explain the emergence of doctrines such as EU law supremacy and direct effect. Therefore, in the following part, it will be reviewed whether the legal autonomy approach can also be applied to account for the influence that the CJEU has used to shape the national legal principles. Does the CJEU only develop its legal principles while taking into account the interests of the Member States, or is it only using its powers to further integration, thereby potentially disregarding the principles of the Member States?

Relying heavily on the case study conducted above on the principle of legitimate expectations (especially the *ESF* case, which was an CJEU case and not a national case, such as *Hamble Fisheries*), it will be argued that the CJEU has mainly used its autonomy to further integration of legal principles, even if it means going against the interests of the Member States.

3.2 Legal Autonomy

Legal autonomy scholars see the CJEU as a driving mechanism of European integration, that assumes policy making leadership to prevent the erosion of the EU, when Member States are unable or unwilling to comply with their treaty obligations, for example because of their preoccupation with short-term concerns, the prevalence of unanticipated consequences or the instability of Member States' policy preferences.[93]

Application of this theory can be seen in the development of the principles of direct effect and EU law supremacy.[94] The former states that Treaty provisions are directly binding upon Member States and may produce direct legal effect at a

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[93] A. Burley &W. Mattli, *Europe before the Court: A Political Theory of Legal Integration*, in *International Organization 47*, 1993, p. 45, and F. Mancini, *The Making of a Constitution for Europe* in *The New European Community: decision making and institutional change* 179 (Robert O. Keohane & Stanley Hoffman eds., Westview Press 1991).

[94] Case 26/62, *NV. Algemene Trasporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie def Belastingen* [1963] ECR 1, 37; Case 6/64, *Flaminio Costa v. E. N. E. L.* [1964] ECR 585, 593.

national level.[95] The supremacy principle is closely interlinked with this principle, stating that EU law takes precedence over national law in EU-related matters.[96] The principles are clear evidence of the autonomous nature of CJEU decision making, as the court obviously paid very little attention to the intentions of the Member States, and all the more to what it perceived as necessary for integration.[97] Moreover, although most states did not recognize EU law supremacy over national constitutional law, both principles are generally accepted throughout the EU.[98]

However, legal autonomy has only been used to account for the development of doctrines that had no basis in national law, or in the Treaties. If one reviews the cases *Costa v. ENEL* and *Van Gend en Loos*, it is apparent that the basis for these doctrines has been somewhat fabricated by the CJEU. Therefore, it is clear that the CJEU developed these principles autonomously from the Member States. However, with regard to legal principles, the applicability cannot be completely similar, as the CJEU already has a wide basis from which it can derive common principles. Therefore, given the fact proven in the earlier analysis, that the CJEU has ruled against the interests of the Member States (e.g., the *ESF* case), it is necessary to determine whether the legal autonomy theory can account for these decisions as well.

3.3 Legitimate Expectations

As we have seen, the most prominent influence of the CJEU on the Dutch principle of legitimate expectations is in the field of subsidies and state aid, as the *ESF* case clearly shows.[99] It was for the uniform application of subsidy regulations that the CJEU ruled the EU principle of legitimate expectations to be applicable in cases of EU subsidies, even though these were normally governed by national law, if there was no specific reference to EU law.

The reason for this expansion was that fraudulent behaviour of the Dutch government would actually be rewarded. Often, Member States silently encourage, or at the very least condone, applicants of subsidies to alter their applications in order to meet the subsidy requirements. Greater protection offered by the Dutch principle of legitimate expectations would protect benefactors of the subsidy, as it was the governments' and not the applicants' fault, that the subsidy was illegally

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95 Chalmers, *supra* n. 1, at 268–293.
96 Chalmers, *supra* n. 1, at 185–188, 203–205.
97 R. Dehousse, *The European Court of Justice* at 41 (St. Martin's Press 1994).
98 Chalmers, *supra* n. 1, at 188–196.
99 Joined Cases C-383/06 and C-385/06, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening e.a.* [2008]. See Part I, Chapter C, section I.

granted. The CJEU wanted to prevent this practice for all the obvious reasons. If national authorities were to be allowed to protect legitimate expectations on the basis of the national principle, the effectiveness of the fulfilment of obligations, regarding the withdrawal and retrieval of subsidies, would be endangered throughout the EU. Therefore, to prevent this, the CJEU acted and ordered further integration, thereby effectively denying application of the national principle. This clearly goes against Dutch interests, as it negates the higher level of protection for legitimate expectations of individuals that the legislator deemed necessary. In other words, Dutch interests must give way to integration.

The same can be said in cases of *contra legem* application. Contrary to the Dutch legislator, the CJEU deemed it necessary to prevent *contra legem* application. If application contrary to the law were allowed, Member States could deliberately pursue objectives contrary to EU policy, which would then have to be protected by national law. This practice endangers the uniform application of EU law.

3.4 Conclusion

The conclusion that can be drawn from this, is that, when interpreting legal principles, the CJEU does not primarily draw its inspiration from the interests of the Member States, but rather looks at what it deems best to achieve integration, and only after this consideration does it look for common ground. It can therefore be concluded that the legal autonomy approach can accurately reflect the 'behaviour' of the CJEU. If integration and the uniform application of EU law are at stake, the CJEU is obviously not afraid to go against core aspects of national legal principles. From this perspective, drawing a parallel with the doctrines of direct effect and supremacy of EU law is not all that difficult.

4 CONCLUSION

Summing up the findings of the analysis carried out above, this conclusion will provide an answer to the research question, as well as several suggestions for further research.

From the findings presented in the sections A and B, it can be concluded that, although the CJEU claims to draw inspiration from principles common to all Member States, there are still distinctive differences in the interpretation of principles. This conclusion is based on a case study of the principle of legitimate expectations, and shows that, even though the Member States examined in the case study have incorporated the principle, this does not automatically mean that the national interpretation is in conformity with the interpretation of the CJEU.

The analysis of section C shows that the influence of the CJEU on the national interpretation of legal principles varies from Member State to Member State. In Dutch law, there certainly is influence on the interpretation of the principle of legitimate expectations, though only substantially in EU-related cases, where the CJEU has expanded its jurisdiction to cases previously falling under Dutch law. In purely domestic cases, the Dutch principle did not adapt to EU law in any visible way (at least, as of now). In contrast, English administrative law has incorporated the very essence of legitimate expectations in its domestic legal framework.

The second part of the paper examined the legal autonomy theory, and its applicability to the CJEU's rationale when dealing with legal principles. Based on the case study of legitimate expectations, the reasoning shows that the CJEU primarily looks at the interests of integration, and only then at the interests of the Member States and the common ground. Proof of this statement can be found in the *ESF* case, where the CJEU did not hesitate to go against the Dutch principle, in order to ensure the uniform application of EU law.

Even though a lot of ground has been covered, there are undoubtedly many issues left open. For example, this paper does not look at how judges apply the principles in cases where it is mandatory to apply EU law. It would be interesting to research how the national interpretation, 'colours' the application by the national judge of the EU principle. Additionally, the authors acknowledge the limited scope of the research on the second part, which can only be seen as an attempt to provide a preliminary discussion regarding the rationale of the CJEU, when it comes to the court's influence on the interpretation of legal principles in the Member States. Therefore, the analysis provided here should be regarded as an impetus to further research on the issue.